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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 09/449,643      | 11/30/1999  | JAMES WICHELMAN      | 10001192            | 6526             |

22878 7590 05/02/2005

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| EXAMINER |
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GUTIERREZ, ANTHONY

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| ART UNIT | PAPER NUMBER |
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2857

DATE MAILED: 05/02/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

SM

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|---|--------------------------------------|---|--|
| <b>Advisory Action</b><br><b>Before the Filing of an Appeal Brief</b> | <b>Application No.</b><br>09/449,643 | <b>Applicant(s)</b><br>WICHELMAN ET AL. |  |
|   | <b>Examiner</b><br>Anthony Gutierrez | <b>Art Unit</b><br>2857                 |  |

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 11 April 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

- 3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because:
  - (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ They raise the issue of new matter (see NOTE below);
  - (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

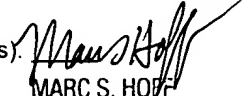
- 4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
- 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
- 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
- 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: \_\_\_\_\_  
 Claim(s) objected to: \_\_\_\_\_  
 Claim(s) rejected: \_\_\_\_\_  
 Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

- 8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
- 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
- 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

- 11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: \_\_\_\_\_.
- 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s): \_\_\_\_\_.
- 13. ☐ Other: \_\_\_\_\_.

  
 MARC S. HOFF  
 SUPERVISORY PATENT EXAMINER  
 TECHNOLOGY CENTER 2800

Continuation of 3. NOTE: The Applicant has amended the claims to more narrowly distinguish them from the prior art. The Applicant has presented arguments that the amended features are not taught in the references previously relied on in rejection of the claims. The Applicant has also referred to three limitations previously presented in the claims that the Applicant alleges were not taught or suggested in the references relied on by the Examiner. In response to the first Office Action by the Examiner, the Applicant chose to amend claims only in form, and chose to add claims sufficiently broad that the Examiner was able to apply his original rejection to the newly added claims. The Applicant opted to argue that limitations recited in the claims were missing from the references relied on by the Examiner, and has, in response to the Final Rejection, presently chosen to amend the claims to be significantly limiting so as to necessitate further search and consideration beyond all action previously taken by the Examiner. For these reasons, the newly amended claims will not be entered and all arguments with respect to limitations presented only in these claims are moot. With respect to the first of the three previously presented limitations, the Examiner disagrees with the Applicant and believes that Schwartzman et al. (US Patent 6,385,773 B1) does disclose a channel plan in the broadest reasonable interpretation. In a passage previously cited by the Examiner, (col. 10, line 59-col. 11, line 6), Schwartzman et al. discloses a step in which the spectrum analyzer initiates a search for a cleaner or preferred frequency channel having a lower noise level. When certain conditions are met a headend instructs cable modems using a particular high BER channel to transition to the frequency channel with the lower noise level. The use of conditions for control of channel transition is considered by the Examiner to be a channel plan. The second previously presented limitation addressed by the Applicant is with respect to a plot produced in the reference to Chen (US Patent 6,570,913 B1). The Applicant's arguments are with respect to the teachings of Chen alone, whereas the Examiner's reliance on Chen is as a teaching reference in combination with at least a second reference that serves as a primary reference. The Examiner maintains that all limitations addressed presently by the Applicant with respect to the teachings of Chen are taught by the combination that includes Chen, as previously presented by the Examiner. Lastly, the Examiner disagrees with the Applicant regarding claim 6, and maintains that at least "channel power" is taught in the previously cited sections relied on with respect to this claim. The Examiner would also like to note that in related citations of the reference, particularly those regarding the FFT addressed in the previously cited sections relied on with respect to claim 6, regarding the calculation of power level data scanned or examined, a power measurement of the entire upstream band is determined (col. 9, lines 31-52) and average, minimum, or maximum power levels of a particular frequency band are determined (col. 10, lines 15-52)..